

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Complaint on Electronic Postmark®

Docket No. C2004-2

MOTION OF THE UNITED STATES POSTAL SERVICE
TO DISMISS
(April 26, 2004)

On February 25, 2004, DigiStamp, Inc. filed with the Commission documents to initiate a complaint proceeding, pursuant to 39 U.S.C. § 3662, on the subject of United States Postal Service Electronic Postmark® (USPS EPM), currently being offered by the Postal Service. The fundamental basis for the DigiStamp complaint is the allegation that the Postal Service is acting unlawfully by offering this purely electronic service without first submitting to the Commission a request for a recommended decision on classification provisions and rates associated with this service. The Postal Service asserts that complaint proceedings before the Commission were not intended and are not appropriate to resolve issues as to whether the Postal Service is acting beyond its lawful authority, as DigiStamp alleges. Nothing in title 39, United States Code, beyond those matters subject to the Commission's role as outlined in section 404(b)(5) and chapter 36, gives the Commission authority to approve or review the Postal Service's exercise of its independent authority to carry out its own powers and duties under the statute. In as much as the complaint calls upon the Commission to determine the status of USPS EPM as a "postal" or "nonpostal" service, the Postal Service moves that the Commission dismiss the complaint.

In the alternative, even assuming incorrectly that the Commission has the authority to resolve such matters in complaint proceedings, DigiStamp is in error to allege that USPS EPM is a "postal" service. Since the Commission lacks jurisdiction over "nonpostal" services such as USPS EPM, the complaint alternatively should be

dismissed on that basis.

- I. THE COMMISSION LACKS STATUTORY AUTHORITY TO RESOLVE A CHALLENGE TO THE POSTAL SERVICE'S DETERMINATION NOT TO SEEK A RECOMMENDED DECISION FOR A NEW SERVICE ALLEGED TO BE A "POSTAL" SERVICE.

Section 3662, the rate and service complaint provision of the Act, states:

Interested parties who believe the Postal Service is charging rates which do not conform to the policies set out in this title or who believe that they are not receiving postal services in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe. . . .

39 U.S.C. § 3662. Because DigiStamp makes no allegations regarding postal services that it is "receiving," the "service" portion of section 3662 is plainly not relevant.

Instead, what DigiStamp seeks to initiate is a "rate" complaint. Rate complaints were intended to allow interested parties to challenge the rates being charged, presumably in accord with previous action by the Commission and the Governors, for existing postal services. The gravamen of the complaint, however, involves not the matter of the rates that are being charged, but whether the Postal Service acted lawfully when offering USPS EPM without a recommended decision from the Commission.

All three claims in the complaint rest directly on the erroneous postulation that USPS EPM constitutes a "postal" rather than a "nonpostal" service.^{1/} In essence, DigiStamp is seeking from the Commission nothing more than a declaration that USPS EPM is a "postal" service, the unilateral establishment of which is beyond the statutory powers of the Postal Service. Yet there is nothing in the language of section 3662

^{1/} Thus, the first claim of DigiStamp (§§17-24) is without merit because the Postal Service is not required to request a recommended decision from the Commission on rate or classification provisions relating to a "nonpostal" service; the second claim (§§30-47) is without merit because section 3622(b) does not apply to a "nonpostal" service; and the third claim (§§48-53) is without merit because section 3661 does not apply to changes in "nonpostal" services. (Although DigiStamp does not so state, the first and third claims must be in the alternative, because there is no basis in the Act, in logic, or in past practice to require that a new service proposed to be established in accordance with sections 3622-3625 also be the subject of a request for an advisory opinion pursuant to section 3661.)

which suggests any intent on the part of Congress to grant the Commission the authority to declare independent actions of the Postal Service to be either lawful or unlawful. The subject of a rate complaint was intended to be "rates," not the issue of whether or not a service had been lawfully established. DigiStamp is seeking from the Commission something which the Commission has no authority to grant under the plain language of section 3662.

If this matter is reviewable, a United States district court is the appropriate forum for a party challenging unilateral action of the Postal Service, including the implementation of new services or rates without participation by the Commission. This conclusion is supported by the contemporaneous interpretation of the statutory scheme in the years immediately following postal reorganization. During that period, the Postal Service initially took the position that all special services were "nonpostal" and were excluded from Commission jurisdiction. Accordingly, the Postal Service proposed to implement special service fee changes unilaterally. Rather than file a complaint with the Commission under section 3662, challenging parties took the Postal Service to district court, seeking a determination that no fee changes for those services could be implemented without a recommended decision from the Commission. In that instance, the court sided with the challengers, and ruled that each of the services in question was a "postal" service, and thus under the jurisdiction of the Commission.^{2/} Clear precedent therefore exists that district courts are available to address and resolve the exact issue upon which the DigiStamp complaint must hinge.^{3/}

^{2/} *Associated Third Class Mail Users v. US Postal Service*, 405 FSupp 1109, 1115-118 (DDC 1975) (hereinafter *ATCMU*), *affirmed*, *National Assoc. of Greeting Card Publishers v. US Postal Service*, 569 F2d 570, 595-598 (DC Cir 1976) (hereinafter *NAGCP I*), *vacated on other grounds*, *US Postal Service v. Associated Third Class Mail Users*, 434 U.S. 884 (1977).

^{3/} Furthermore, another alleged competitor, UPS, has gone to district court, rather than file a complaint with the Commission, in earlier instances in which it was alleging that the Postal Service was illegally offering an experimental service without first

In the past, the Commission itself has had occasion to redirect parties initiating complaints under section 3662 to district court. In Commission Order No. 724 (Dec. 2, 1986), the Commission declined to consider in a complaint case whether a Domestic Mail Manual (DMM) provision promulgated by the Postal Service was illegal because it had not first been submitted to the Commission as a proposed Domestic Mail Classification Schedule (DMCS) change. The Commission observed that district courts "have several times heard complaints that the Service has 'classified' mail without invoking Commission procedures." *Id.* at 13. In this case, DigiStamp is making exactly such an allegation -- claiming that the Postal Service created a new mail classification (*i.e.*, USPS EPM), without invoking Commission procedures.

In Order No. 724, the Commission also suggested the types of problems that could develop were it to attempt to adjudicate whether the Postal Service had improperly taken action without fulfilling an obligation to consult the Commission:

First, it appears that the right forum for determining the validity of a Postal Service rule, purportedly issued under its independent administrative powers, would be a United States District Court. . . . As an abstract matter, we could resolve such a question. However, if we found the rule invalid, lacking general equitable powers, we could not enjoin enforcement of the rule or require an accounting of postage collected under it.

Id. at 11. Ironically, these comments foreshadowed the impasse that developed in the Pack & Send complaint case, Docket No. C96-1, when the Commission, although concluding that the pilot service should not have been offered without invoking Commission procedures, lacked general equitable powers to enjoin the Postal Service from continuing to offer the service. This circumstance created the situation in that case, in which the Commission found the complaint to be justified, but refused to issue a recommended decision upon which the Governors could act, despite the plain

seeking the necessary recommended decision from the Commission. *UPS v. US Postal Service*, 455 FSupp 857 (ED Pa 1978), *aff'd* 604 F2d 1370 (3d Cir 1979), *cert. denied*, 446 US 957 (1980). There is no reason why DigiStamp should not follow the same procedure in this instance.

language of section 3662 and its own Rule 87, both of which require a recommended decision under those circumstances.^{4/} The way to avoid such an impasse, consistent with the comments made by the Commission in Order No. 724, is to leave the matter for the district court.

In their Decision in the Pack & Send case, the Governors stated that they "do not concede that section 3662 gives the Commission jurisdiction to review new products and services to establish their status as postal or nonpostal services." Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission on the Complaint of the Coalition Against Unfair USPS Competition, at 4, Docket No. C96-1 (April 8, 1997) (hereinafter "Gov. Dec. C96-1"), 62 Fed. Reg. 23,813. In retrospect, the experience of the Pack & Send case demonstrates why the limited authority granted the Commission in section 3662 rate complaint cases does not extend to challenges to new products based on their status as postal or nonpostal services. Authority to entertain legal challenges to the validity of independent actions of the Postal Service falls, if anywhere, within the province of the district courts, not the Postal Rate Commission. The Commission should promptly dismiss the instant complaint on the grounds that the Commission lacks authority to resolve the claims that DigiStamp has made.

^{4/} In the Pack & Send case, the Commission elected to issue what it chose to call a "Declaratory Order," rather than the recommended decision required by statute, on the grounds that "a recommended decision simply declaring that Pack & Send is a postal service, and thus subject to the Commission's jurisdiction, would be a hollow vessel lacking any recommendation of substance upon which the Governors could act under § 3625." Commission Order No. 1145 at 24 (Dec. 16, 1996). By this statement, the Commission implicitly acknowledged that the only remedy authorized within the context of a section 3662 rate complaint, to issue a recommended decision, does not encompass authorization to adjudicate complaints of the exact variety presented in this instance. Just as the Commission suggested in the above-quoted portion of Order No. 724, the lack of general equitable powers precludes the expansion of section 3662 complaints to questions concerning the validity of unilateral actions of the Postal Service.

II. EVEN ASSUMING THE COMMISSION IS AUTHORIZED TO ANSWER THE QUESTION OF WHETHER USPS EPM IS A POSTAL OR NONPOSTAL SERVICE, THE COMPLAINT SHOULD STILL BE DISMISSED BECAUSE THE SERVICE IS CLEARLY A NONPOSTAL SERVICE.

Even assuming that the Commission is authorized to answer the question of whether USPS EPM is a postal service for purposes of chapter 36 of title 39, the Complaint must still be dismissed on the ground that USPS EPM is not a “postal service” for purposes of sections 3622, 3623, 3661, and 3662 of title 39, United States Code. Complainant’s basis for having the Commission examine USPS EPM is its contention that the service is a “postal service” for which the Postal Service must request a recommended decision on the product’s rate and classification from the Commission in accordance with the criteria of sections 3622 and 3623, or, an advisory opinion for a nationwide change in service under section 3661. This conclusion has no basis in the plain language or subsequent interpretation of the Act; consequently, the Complaint must be dismissed.

A. The Courts, the Commission, and the Governors Have Evaluated The Postal Character Of Services According To Their Relationship To Hardcopy Postal Networks.

The Postal Reorganization Act limits the ratemaking procedures of chapter 36 of title 39, United States Code, to “postal” services. The Act provides that the Postal Service, “shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates or in a fee or fees *for postal services* if the Postal Service determines such changes would be in the public interest and in accordance with the policies of this title.” 39 U.S.C. § 3622 (emphasis supplied). Rates for “postal” services are to be distinguished from those for “nonpostal” services, which Congress gave the Postal Service unilateral authority to provide. Specifically, section 404(a)(6) of Title 39, United States Code, provides:

Without limitation of the generality of its powers, the Postal Service shall have the following specific powers, among others:

. . .

(6) to provide, establish, change, or abolish special nonpostal or similar services;

39 U.S.C. § 404(a)(6).^{5/}

In determining whether a particular service is a postal service within the meaning of section 3622, the primary precedents available are two judicial opinions, *ATCMU* and *NAGCP I*, and several opinions by the Commission and the Governors in Docket Nos. R76-1, C95-1, and C96-1. Absolutely none of these authorities has concluded that completely electronic services are “postal” in nature; rather, all of the authorities that have considered the question of what is a “postal service” have concluded that such services must bear, at minimum, some relation to hardcopy postal delivery networks.

1. *ATCMU*

The underlying controversy in *ATCMU* concerned the postal character of a variety of special services.^{6/} The court found the services it reviewed to be postal

^{5/} The absence of a comma between "special" and "nonpostal" appears to be an oversight. The *ATCMU* court read section 404(a)(6) to include a comma between "special" and "nonpostal:"

Section 404(6) gives the Postal Service the power "to provide, establish, change, or abolish special[,] nonpostal or similar services."

ATCMU, 405 F. Supp. at 1117 (brackets in original). The Court of Appeals for the District of Columbia in *NAGCP I* also read section 404(a)(6) to include a comma between "special" and "nonpostal" in section 404(a)(6). The court noted that "it is generally agreed that the absence of a comma between 'special' and 'nonpostal' was inadvertent." *Id.*, 569 F2d at 597 n.119.

^{6/} The services in question were: (1) the furnishing of mail list corrections; (2) the privilege of prepayment of postage without stamps; (3) the forwarding or returning of undeliverable mail; (4) the registry of mail; (5) the insurance of mail; (6) the provision of COD mail; (7) the certification of mail; (8) the securing of a signed receipt upon the delivery of mail and the returning of it to the sender; (9) special delivery; (10) the special handling of mail; and (11) the provision of money orders. 405 F. Supp. at 1115. The provision of money orders was noted by the court to be an exception to its reasoning. The provision of postal money orders is the only service which falls outside the framework of analysis generally used by the two courts and the Commission. The district court held that the provision of money orders was a postal service, although it noted that this conclusion was based on an exception to its general reasoning. The court supported its determination to include money orders on several grounds. First, it noted that the majority of money orders sold at post offices are actually sent by mail.

services because they are “very closely related to the delivery of mail.” The court stated its opinion that “all of these services would be considered ‘postal services’ in ordinary parlance.” *ATCMU*, 405 F. Supp. at 1115.

2. *NAGCP I*

In reviewing the district court’s decision in *ATCMU*, the Court of Appeals for the District of Columbia Circuit noted that it did not adopt all of the district court’s reasoning, but found its interpretation of the Act persuasive and its holding legally correct and adequately supported. *NAGCP I*, 569 F.2d at 596-97. The court did not specify, however, any areas of disagreement with the district court’s reasoning. Like the district court, the Court of Appeals began by “[g]iving ‘postal services’ a plain meaning,” and concluded that the services at issue “may reasonably be so classified.” The court stated that “each clearly involves an aspect in the posting, handling and delivery of mail matter.” The Court of Appeals summarized its holding as agreement “with the district court that a plain reading is the proper reading of § 3622: ‘postal services’ as used there is a generic term and was meant to include all the special services here at issue.” *Id.* at 596-97.

3. Docket No. R76-1

In Docket No. R76-1, the Commission had the district court’s opinion in *ATCMU* before it when it determined whether it would recommend fees for a number of services. The Commission began by dividing the menu of services offered and sold by

The court also included postal money orders as a service that would be considered postal services in ordinary parlance. *ATCMU*, 405 F. Supp. at 1115. The Court of Appeals also recognized that money orders was the “one possible exception” to its reasoning regarding what is and is not a postal service. The Court of Appeals, like the district court, relied on the fact that the “great majority of these are sent through the mail” and that the provision of money orders may be viewed as “intimately a part of postal services.” *NAGCP I*, 569 F. 2d at 596.

the Postal Service. PRC Op., R76-1, Vol. 2, App. F at 3-5 (hereinafter “App. F”).^{7/} The Commission first distinguished between services that provide “actual carriage (i.e., collection, transmission and delivery) of mail matter” and “all other services performed by the Postal Service.” App. F at 1-2. The Commission identified two subdivisions within the “other services” category, including “services rendered to the public” and “services performed by the Postal Service for other agencies of the United States.” App. F. at 2. The latter, in the Commission’s view, were “in no sense” considered postal services. Within the former category, the Commission distinguished between “jurisdictional from nonjurisdictional” services. App. F at 2-3. The distinction between these categories was quite simply:

the relationship of the service to the carriage of mail. Those which can fairly be said to be ancillary to the collection, transmission, or delivery of mail are postal services within the meaning of § 3622. A change of fees for any of these services would therefore be a proper subject of a recommended decision.

Id. at 3.

Thus, the test the Commission employed to determine the postal character of services at issue in R76-1 was in essence the relationship the relevant service or

^{7/} The Commission expressed serious reservations concerning the district court’s holding, later affirmed by the Court of Appeals, that the sale of postal money orders is a postal service: “We think it not unlikely that, with all due respect to the District Judge, a somewhat stricter standard of jurisdiction would be appropriate. . . . We are inclined to doubt the jurisdictionality of money orders because of their lack of intrinsic connection with the carriage of mail.” App. F at 12. The Commission expressed the hope that it would have an opportunity to reconsider its adherence to the court’s precedent in the future. *Id.* In its analysis, the Commission noted that the district court (and unbeknownst to it at the time, subsequently the court of appeals as well) based its conclusion at least in significant part on the fact that the vast majority of money orders were sent by mail: “The connection [the district court] found between money orders and the carriage of mail was thus statistical, rather than structural (as was the case with the other special services before [the court]).” App. F at 11. In its analysis of the nature of the sale of postal money orders, the Commission expressed an additional concern: that the availability of alternative money orders from private businesses might constrain the price charged by the Postal Service, leading to cross-subsidization by other services. Although the Commission noted that the benefit would inure to those members of the public not having access to alternative money order services, it expressed no opinion as to whether it would countenance this hypothetical cross-subsidization.

product had to the carriage of mail in the collection, transmission, or delivery function. App. F at 7-25. Using this test, the Commission concluded that philatelic products, photocopy service, retail products, record retrieval, vending machines, sexually oriented advertising exemption lists, bulletin boards, and notary services were not postal services because they bore little relation to the actual carriage of mail. *Id.*

4. Docket No. C95-1

The Commission employed the *ATCMU* legal standard to evaluate the services at issue in Docket Nos. C95-1. In that proceeding, the Commission dismissed a complaint challenging planned increases in the shipping and handling charges for orders placed with the Postal Service Philatelic Fulfillment Service Center catalog sales program. The Postal Service moved to dismiss the proceeding, primarily on the ground that, “the subject matter. . . concerns philatelic services which are not within the scope of 39 U.S.C. § 3662.” Motion of the United States Postal Service to Dismiss Proceeding, April 13, 1995, at 2 (footnote omitted). The Commission concurred with the Postal Service’s primary jurisdictional argument and dismissed the complaint. The Commission resorted to the legal standard in the *ATCMU* decision in disposing of the Complaint:

Applying the rationale of the District Court to the facts involved in the present complaint, the Commission finds that the services involved—the handling and shipping of catalog orders placed with the Philatelic Fulfillment Service Center—are not closely related to the delivery of mail and, therefore, the charges for such services do not constitute ‘fees for postal services’ within the scope of section 3662 of title 39, United States Code.

PRC Order No. 1075 at 5 (September 11, 1995).^{8/}

5. Docket No. C96-1

In Docket No. C96-1, the Commission was confronted with a Complaint alleging

^{8/} Complainant subsequently petitioned for reconsideration of the Commission’s determination to dismiss the Complaint. The Commission denied his motion in PRC Order No. 1088 (November 15, 1995).

that classification and fees for the Postal Service's Pack & Send product were subject to evaluation by the Commission. In that proceeding, the Commission issued a "declaratory order" concluding that Pack & Send service was a postal service. The Commission arrived at this result by measuring the relationship of the service to the carriage of mail. PRC Order No. 1145 at 11-12, 19. The Commission explained:

The courts have stated that the fundamental inquiry to be made is whether the service under scrutiny is a "postal service" in ordinary parlance, the "plain meaning" of which is established by reference to the routine postal functions of accepting, handling and delivering mail matter.

PRC Order No. 1145 at 12. The Commission then applied this standard in evaluating Pack & Send's postal character:

Pack & Send service has a direct structural relationship to the provision of postal services. Intrinsically, it is a value-added service available for the categories of parcel service provided by the Postal Service; the locus of the added value is the alternative form of acceptance it provides. For this reason, Pack & Send is a service "other than the actual carriage of mail but supportive or auxiliary thereto[,] which "enhance[s] the value of service rendered under...substantive mail classes[,] and thus satisfies the general criterion for "postal" services formulated by the Commission in Docket No. R76-1. PRC Op. R76-1 at 267. In common parlance, as well as under these more analytical legal tests, it is a postal service.

PRC Order No. 1145 at 19. The Commission reaffirmed its conclusions in Order No. 1156, where it rejected a motion by the Postal Service to reconsider Order No. 1145.

The Governors construed Order Nos. 1145 and 1156 in Docket No. C96-1 as a recommended decision and rejected them. Gov. Dec. C96-1. Although the Governors questioned the Commission's use and application of the analytical tests the Commission employed to arrive at its conclusion, the Governors suggested that, consistent with *ATCMU* and *NAGCP I*, the relevant inquiry is whether the service "bear[s] any substantive relationship to mail in an operational sense." Gov. Dec. C96-1, 62 Fed. Reg. 23,816.

Notwithstanding the differing views presented by the Governors and the Commission in Docket No. C96-1, both bodies have consistently resorted to the legal

standards of the *ATCMU* and *NAGCP I* opinions to evaluate the postal character of services offered by the Postal Service.^{9/} As discussed below, there is no relationship between USPS EPM and traditional postal functions. Digistamp's Complaint does not support any other conclusion.

B. USPS EPM Bears No Relationship To Postal Services, As Defined By The Courts, the Commission, and the Governors.

USPS EPM is not a "postal service" as that term is used in chapter 36 of title 39, United States Code. It does not fall within any of the definitions of postal services put forth by the courts, the Commission, or the Governors. Two facts support the conclusion that it is not a postal service "in ordinary parlance." First, it is a totally electronic service. Second, even within the context of purely electronic interactions, the transfer of something from a sender to a recipient, which is the essence of a postal function, is not part of an USPS EPM transaction. Taken independently, either of these facts would be sufficient to demonstrate that USPS EPM is not a postal service. Taken together, they negate the possibility of any other conclusion.

1. USPS EPM is a totally electronic service

Because it lacks any hard copy element, customers of USPS EPM make no use of the mail services traditionally offered by the Postal Service, such as collection, acceptance, processing, handling, transportation, and delivery functions maintained and operated by the Postal Service. Customers of the service need never touch or interact with a collection box, mailbox, or postal retail unit to conduct USPS EPM transactions. In fact, customers *cannot* interact with the components of the hardcopy

^{9/} With regard to the statistical standard employed by the Commission in Order No. 1145, the Governors noted that, "it is difficult to see how a standard based on frequency of [mailing] can determine Commission jurisdiction." Gov. Dec. C96-1, 62 Fed. Reg. 23,816. The Governors also stated that they do not "endorse [the public effect standard] as a guide to future policy, or as a test of the Postal Service's or the Commission's jurisdiction." *Id.*

delivery network. Customers of the USPS EPM service can only interact with the Postal Service through a computer link to the internet. There is no USPS EPM “retail” option, in which a visit to the local post office offers an alternative mode of gaining access to the service. The separation between physical postal services and USPS EPM is absolute and comprehensive.

As an all electronic service, USPS EPM is not “very closely related to the delivery of mail.” *Cf. ATCMU*, 405 F. Supp. at 1115; see *also* PRC Order No. 1075 at 5. USPS EPM, moreover, involves no aspect of the “posting, handling, and delivery of mail matter,” *cf. NAGCP I*, 569 F.2d at 596-97, or, similarly, to the “routine postal functions” of “accepting, handling and delivering mail matter,” *cf. PRC Order No. 1145* at 12. Furthermore, unlike Mailing Online and E-COM, USPS EPM does not involve communications that begin electronically but are later converted to hardcopy form for delivery. Thus, as an unbundled completely electronic service, USPS EPM cannot be “ancillary to the collection, transmission, or delivery of mail.” *Cf. App. F* at 3-5. It is unimaginable how USPS EPM could be said to “bear any substantive relationship to mail in an operational sense” under these circumstances. Furthermore, USPS EPM bears no relationship to existing postal services, under either a “structural” analysis or “statistical” measurement standard, since it does not complement existing hardcopy communications in any way. *Cf. PRC Order No. 1145* at 15-18.^{10/}

2. USPS EPM does not deliver anything between senders and recipients

The purpose of USPS EPM service is to protect the integrity of electronic data. The features of USPS EPM include time stamps and hash codes (which “lock” the document in the sense of providing the ability to detect any subsequent tampering or alteration), and support digital signatures. By establishing proof of who did what with

^{10/} By analyzing EPM under the “statistical” legal standard in the instant motion, the Postal Service does not concede that such a standard is an appropriate analytical tool.

electronic data and when, USPS EPM minimizes the opportunity for later efforts to repudiate the existence of, or the elements of, electronic content. As noted even in the Complaint itself, however, the Postal Service never has access to the content of the USPS EPM purchaser's data, and USPS EPM requires no modification or transmission of content. Complaint ¶ 4 (citing the Postal Service's website). Of critical significance, not only does USPS EPM service require no transmission of content, but it accomplishes no transmission of content. After application of a USPS EPM, any transmission between a sender and a recipient of electronic data to which the USPS EPM has been applied would have to be achieved by means wholly independent of the USPS EPM function. Indeed, USPS EPM customers may wish to apply USPS EPMs to electronic data which they intend to store indefinitely in their own files and which, depending on subsequent events, may never be transmitted to anyone.^{11/} There is no necessary linkage between application of a USPS EPM to electronic data, and the transmission of that data between a sender and a recipient.

According to the legal standards discussed at great length above, a postal service must either directly involve the carriage of mail, or be ancillary to the carriage of mail. See, e.g., PRC Op., R76-1, Vol. 2, App. F at 3-5. As established in the previous section, the Postal Service disputes that "carriage of mail" can be equated with purely electronic transfers of information. Even assuming *arguendo*, however, that information which always exists only in a totally electronic form could constitute "mail" in this context, the "carriage" function would still require that such "mail" be delivered from a sender to a recipient. In a situation in which nothing moves between a sender and a recipient, which is the situation with respect to USPS EPM service, it is impossible to

^{11/} Thus, for example, a medical doctor might routinely apply an EPM to his or her electronic write-up of patient records at the end of each day, in order to be able to verify later (if necessary) that the records were created contemporaneously with the patient examinations, and had not been altered since.

construe any “carriage of mail” that is the *sine qua non* of a postal service.

Obviously, the Postal Service is not suggesting that no or few USPS EPM customers would use the service to enhance the utility of subsequent electronic document exchange. To the contrary, running electronic data through the USPS EPM process is often a step towards broader participation in electronic commerce, and other varieties of electronic information transmission. Subsequent steps, however, including any actual transfer of electronic data, would have to be conducted by means other than USPS EPM. Rather than being “ancillary” to such an electronic exchange, USPS EPM service constitutes a wholly independent transaction, which may or may not be followed by such an exchange, depending on the needs of particular USPS EPM customers.^{12/}

Given its general purpose of protecting the integrity of electronic data, the non-electronic services most analogous to USPS EPM service are those provided by a notary public. For example, notaries can verify that a true copy has been made from an original document, or that a written statement is one that has been sworn to by a particular individual at a given time and place. In functional terms, the role of a notary

^{12/} Of the services previously believed to be “postal,” the one that has superficial resemblance to EPM in this respect is money orders. As noted in the above discussion, purchasers of money orders may or may not avail themselves of mail services to accomplish delivery of the money orders they buy. And, as also noted in the above discussion, this logical disconnect between money orders and use of the mails has generated reservations among even those who have nonetheless classified money orders as a postal service. An important distinction, however, is that the issue with respect to money orders appears to involve whether the delivery of the money order will be achieved by mail, or otherwise (for example, in person). See PRC Op., Docket No. R76-1, App. F at 11. The intrinsic nature of a money order, though, is to transfer money from one person or entity to another person or entity. *Id.* Unlike purchasers of EPM, money order purchasers seem highly unlikely to utilize the service outside the context of circumstances in which some immediate transfer (in this instance, of funds) is contemplated. The broad range of potential applications of EPMS precludes any such facile analysis. Moreover, the Supreme Court’s very recent opinion in the *Flamingo* case characterizes (albeit without substantive discussion) money order services as nonpostal, further calling into question the practicality of relying on any similarity to money orders to justify the classification of EPM as postal. See *US Postal Service v Flamingo*, 540 US ____, 124 S.Ct. 1321, (No. 02-1290, Feb. 25, 2004), Slip Op. at 11.

public with respect to physical documents, and the role of USPS EPM with respect to electronic data (although without authentication of identity), are similar.^{13/}

As indicated above, however, the Commission has already found that notarial services are nonpostal. In Docket No. R76-1, the Commission stated:

The Postal Service performs certain community service functions such as the maintenance of bulletin boards in post offices lobbies and the provision of notary public services by postmasters in Alaska. The latter function is clearly non-postal and not within Commission jurisdiction.

PRC Op., Docket No. R76-1, App. F at 25. Thus, even in the context of notarial services that presumably were applied to hardcopy documents, the Commission did not hesitate to declare such services to be nonpostal. While the Commission did not share the reasoning behind its conclusion, the likely thrust of that reasoning seems obvious. There is no necessary connection between obtaining the seal of a notary public, and the subsequent delivery of the document by mail. A notarized document could be mailed, or it could be delivered by hand, or, if something like a will, it could simply be taken home and filed. Notarial services in the hardcopy world stand distinct from the physical transfer of something between a sender and a recipient. Similarly, in the electronic world, USPS EPM stands distinct from the electronic transfer of something between a sender and recipient. By any standard, it is a nonpostal service.^{14/}

^{13/} It is important to emphasize here that the Postal Service is not claiming any legal or technical equivalence between USPS EPM and notarial services. The point is, rather, that, at least from the layman's perspective, the general purposes of each function are quite similar across the disparate spheres of electronic and paper-based information.

^{14/} In Docket No. C99-1, in response to the Postal Service's request to dismiss the Post ECS complaint on the grounds that the service in question was inherently nonpostal, the Commission declined to do so. Order No. 1239 (May 3, 1999). Specifically, the Commission noted that, despite the lack of dependence of Post ECS service on the hardcopy postal network, complainant in that case had made a colorable claim that Post ECS service was the delivery of mail "because it accomplishes by electronic means all the functions that would otherwise be performed by conveying a physical message or document." *Id.* at 19. (Earlier in that Order, at page 2, the Commission had described Post ECS as "an all-electronic service designed to transmit documents securely from a sender to an intended recipient.") While the Postal Service strongly disagrees with the suggestion that an all-electronic document transmission

Simply put, USPS EPM does not fall within the definition of “postal services” as defined by the courts, the Commission, and the Governors. Rates and classifications for the service are not within the purview of chapter 36 of title 39. The complaint therefore must be dismissed.

CONCLUSION

Because the authority to entertain rate complaints under 39 U.S.C. § 3662 does not extend to deciding issues of whether the Postal Service has exceeded its statutory powers by establishing a new service without invoking Commission proceedings, the DigiStamp complaint should be dismissed. In the alternative, because a purely electronic service such as USPS EPM, which does not transfer anything between a sender and a recipient, is a "nonpostal" service, and therefore beyond the Commission's jurisdiction, the complaint should be dismissed on that basis.

Respectfully submitted,

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service could be a postal service – an issue ultimately not resolved by the Commission in Docket No. C99-1 – it is transparently clear in this case that USPS EPM service neither performs, nor purports to perform, “all of the functions that would otherwise be performed by conveying a physical message or document.” Unlike Post ECS, there is no sender, no intended recipient, and no delivery function.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

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